BRIEF IN SUPPORT OF PETITION

OPINIONS OF COURTS BELOW

There was no written opinion in the trial court.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (a copy of which is found at pages 711-721 of the record), filed April 26, 1943, has not yet been reported.

STATEMENT OF THE CASE

The case has been stated in the foregoing petition. To obviate repetition the Court is referred to the summary statement of the matters involved set forth in the petition.

SPECIFICATION OF ERRORS

1. The appellate court erred in holding that under the indictment (r. 1-2) it was not necessary to prove that the petitioner knew of, and became a party to, a conspiracy to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars (r. 15-22), but that it was proper and sufficient to show that he knew of, and became a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted, without having in contemplation the transportation of any specific woman or girl.

2. The appellate court erred in holding that the evidence was sufficient to support a finding by the jury that the petitioner knew of, and became a party to, such a general conspiracy.

3. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 6 (r. 679) of the instructions requested by the petitioner was not prejudicial and reversible error.

4. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 10 (r. 682) of the instructions requested by the petitioner was not prejudicial and reversible error.

5. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 24 (r. 687) of the instructions requested by the petitioner was not prejudicial and reversible error.

6. The appellate court erred in holding that the trial court's refusal to give the jury the instruction numbered 29 (r. 691-692) of the instructions requested by the petitioner was not prejudicial and reversible error.

7. The appellate court erred in holding that the pronounced, persistent and prejudicial misconduct of the prosecuting attorneys at and throughout the trial was excusable and did not constitute a basis for the reversal of the trial court's judgment.

8. The appellate court erred in affirming the trial court's judgment (r. 23-24).

ARGUMENT OF QUESTIONS PRESENTED

I

SHOULD NOT THE OPINION AND DECISION OF THIS COURT IN THE CASE OF LOUIS ATHANASAW AND MITCHELL SAMPSON V. UNITED STATES, 227 U. S. 326, 57 L. ED. 528, 33 S. C. 285 (WHEREIN IT APPARENTLY WAS HELD THAT IT IS VIOLATIVE OF THE ACT OF JUNE 10, 1910, SECTION 397 ET SEQ., TITLE 18, U. S. C. A., KNOWN AS THE WHITE SLAVE TRAFFIC ACT, TO PROCURE OR TO AID THE INTERSTATE TRANSPORTATION OF A WOMAN OR GIRL FOR THE PURPOSE OF EMPLOYING HER IN SUCH **SURROUNDINGS** AS WOULD **TEND** "TO INDUCE HER TO GIVE HERSELF UP TO A CONDITION OF DEBAUCHERY WHICH **EVENTUALLY** AND NATURALLY **WOULD LEAD HER TO** A COURSE OF IMMORALITY SEXUALLY"), BE RECONSIDERED AND RECEDED FROM, OR, AT LEAST, REVISED AND CLARIFIED, FOR THE REASONS THAT (A) BY THE PROVISIONS OF THE ACT, IF IT IS TO BE SO CONSTRUED, THE CITIZEN IS NOT INFORMED WITH REASONABLE PRECISION WHAT CONDUCT IS PROHIBITED SO THAT HE MAY HAVE A CERTAIN ASCERTAINABLE AND UNDERSTANDABLE RULE OF CONDUCT AND MAY KNOW WHAT CONDUCT IT IS HIS DUTY TO AVOID; (B) IN EACH CASE WHERE AN INDICTMENT IS SOUGHT, BECAUSE OF AN ALLEGED VIOLATION OF THE ACT AS SO CONSTRUED, THE GRAND JURORS ARE LICENSED TO CREATE THEIR OWN STANDARDS IN DETERMINING WHETHER THE SURROUNDINGS IN QUESTION WERE SUCH AS **TENDED** TO INDUCE

THE WOMAN OR GIRL IN QUESTION TO GIVE HERSELF UP TO A CONDITION OF DEBAUCHERY WHICH **EVENTUALLY** AND NATURALLY **WOULD LEAD HER TO** A COURSE OF IMMORALITY SEXUALLY; (C) IN EACH CASE WHERE AN INDICTMENT IS RETURNED, BECAUSE OF AN ALLEGED VIOLATION OF THE ACT AS SO CONSTRUED, THE PETIT JURORS ARE SIMILARLY LICENSED TO CREATE THEIR OWN STANDARDS; (D) CONSEQUENTLY THE MATURITY OR IMMATURITY, THE EXPERIENCE OR INEXPERIENCE AND THE SOPHISTICATION OR LACK OF SOPHISTICATION OF THE WOMAN OR GIRL IN QUESTION, AS WELL AS A NUMBER OF OTHER LIKE FACTORS, ARE MATERIAL MATTERS FOR THE CONSIDERATION OF THE GRAND AND PETIT JURORS; (E) SUCH CONSTRUCTION AS APPARENTLY WAS GIVEN THE ACT IN THE MENTIONED CASE IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT INTELLIGENT MEN ARE NECESSARILY FORCED TO GUESS AS TO ITS MEANING AND TO HONESTLY DIFFER AS TO ITS APPLICATION; AND (F) SUCH CONSTRUCTION DISTORTS THE LANGUAGE OF THE ACT AND IS REPUGNANT TO, AND VIOLATIVE OF, THE DUE PROCESS PROVISIONS OF ARTICLES V AND VI OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION?

A logical approach to a consideration and determination of the stated first question is to indulge in the hypothesis that Congress (rather than the Court) had incorporated in the White Slave Traffic Act a provision by which Congress expressly declared it to be unlawful "to knowingly procure or to aid the interstate transporta-

tion of a woman or girl for the purpose of employing her in such surroundings as would tend to induce her to give herself up to a condition of debauchery which eventually and naturally would lead her to a course of immorality sexually."

Such a provision, it seems to us, would have been clearly repugnant to, and violative of, the due process provisions of Articles V and VI of the Amendments to the Federal Constitution, because Congress, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. Champlin Ref. Co. v. Corporation Commission, 286 U. S. 210, 76 L. ed. 1062, 52 S. C. 559; Connally v. General Constr. Co., 269 U. S. 385, 70 L. ed. 322, 46 S. C. 126; United States v. L. Cohen Grocery Co., 255 U. S. 81, 65 L. ed. 516, 41 S. C. 298; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 S. C. 678; Northern P. R. Co. v. United States (C. C. A. 8), 213 Fed. 162, affirmed in 242 U. S. 190, 61 L. ed. 240, 37 S. C. 22; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 S. C. 538.

The due process provisions of Articles V and VI of the Amendments to the Federal Constitution require an ascertainable standard of guilt (fixed by Congress rather than by courts or juries) and secure to accused persons the right to be informed of the nature and cause of accusations against them. Accordingly, a criminal statute enacted by Congress must define with reasonable precision the act to be punished. If the statute licenses the jury to create its own standard of guilt in each case, it

is unconstitutional and void. United States v. L. Cohen Grocery Co., supra; Herndon v. Lowry, 301 U. S. 261, 81 L. ed. 1077, 57 S. C. 732.

A statute which forbids the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law. Champlin Ref. Co. v. Corporation Commission, supra; Connally v. General Constr. Co., supra.

The quoted hypothetical provision is not found in the White Slave Traffic Act. But by its construction of the act in the case of Louis Athanasaw and Mitchell Sampson v. United States, supra, the Court has apparently injected it into the statute; and if the act is to be construed as if it embraced such a provision it is utterly impossible for any citizen or for any lawyer to determine, with any approximation to precision, what surroundings (if any) would have such a seductive influence on any woman or girl as to **tend** to **induce** her, if employed therein, to give herself up to a condition of debauchery which would **eventually** and naturally lead her to a course of immorality sexually. It is difficult, if not impossible, to conceive of any surroundings which would exert such seductive influence on every woman or girl who should be employed to work in them. The surroundings which would have an evil influence on one woman or girl would have no detrimental effect whatever on another. Lewis v. United States (C. C. A. 7), 110 Fed. (2d) 460.

Whether the employment of a particular woman or girl in certain surroundings, would have a **tendency** to induce her to give herself up to a condition of debauchery

which would eventually and naturally lead her to a course of immorality sexually, is a question which the citizen and his lawyer (with the aid and advice of psychologists and psychiatrists) could not safely determine, and the citizen would be obliged to act at his peril, because both the grand and petit jurors, who are licensed to create their own standards if the act in question is to be construed as it apparently was in the case referred to, might disagree with the composite judgment of the citizen and his expert advisers.

The White Slave Traffic Act is clear and understandable and it fixes an ascertainable standard of guilt. It provides that "any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice, . . . shall be deemed guilty of a felony."

It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 S. C. 889. Before a man can be punished his conduct must be plainly and unmistakably within a statute. United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. C. 126; Donnelley v. United States, 276 U. S. 505, 72 L. ed. 676, 48 S. C. 400; United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. C. 269; United States v. Gradwell, 243 U. S. 476, 61 L. ed. 857, 37 S. C. 407; United States v. George, 228 U. S. 14, 57 L. ed. 712, 33 S. C. 412; Todd v. United States, supra;

United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 S. C. 538; United States v. Lacher, 134 U. S. 624, 33 L. ed. 1080, 10 S. C. 625.

The Court, in the case of Louis Athanasaw and Mitchell Sampson v. United States, supra, has apparently extended by intendment the clear provisions of the White Slave Traffic Act; and has apparently, by construction, brought within the provisions of the act cases which were certainly not theretofore within such provisions.

It should be noted that in the case referred to the indictment (which has been examined by the writers of this brief) followed the language of the White Slave Traffic Act. The indictment was good.

In the instant case, however, the language of the act was departed from in the indictment; and its draftsman culled from the Court's opinion in the case referred to certain language (which dealt with the evidence adduced in support of the charge) and employed such language in the indictment against the petitioner.

If the Court, in the case referred to, meant to, and did, construe the White Slave Traffic Act as making it unlawful "to procure or to aid the interstate transportation of a woman or girl for the purpose of employing her in such surroundings as would tend to induce her to give herself up to a condition of debauchery which eventually and naturally would lead her to a course of immorality sexually" (which is substantially the language which was employed in the indictment in the instant case), we submit that the Court's opinion and decision should be receded from and overruled.

On the other hand, if the Court did not mean to, and did not, so construe the act, the indictment in the instant case did not charge the petitioner with any conduct within the act and his conviction should not be allowed to stand.

II

WHERE, AT THE TRIAL OF A DEFENDANT ON AN INDICTMENT WHEREIN HE WAS CHARGED WITH HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF SPECIFIC WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM (IN A NIGHT CLUB) IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY, THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT KNEW OF, AND BECAME A PARTY TO, ANY PLAN OR AGREEMENT TO EFFECT THE TRANSPORTATION OF ANY OF THE SPECIFIC WOMEN OR GIRLS NAMED OR REFERRED TO IN THE INDICTMENT, CAN HIS CONVICTION BE SUSTAINED EVEN IF THE PROOFS SHOWED THAT THE DEFENDANT KNEW OF, AND BECAME A PARTY TO, A GENERAL, COMPREHENSIVE AND CONTINUING CONSPIRACY TO EFFECT, AT SOME INDETERMINATE FUTURE TIME, THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN OR GIRLS WHENEVER THEY SHOULD BE NEEDED OR WANTED, WITHOUT HAVING IN CONTEMPLATION ANY SPECIFIC WOMAN OR GIRL?

In the indictment (r. 1-4) it was charged that the petitioner and others conspired "to unlawfully, wilfully, knowingly and feloniously transport and cause to be transported and aid and assist in obtaining transportation for and transporting in interstate commerce from Chattanooga, Tennessee, Atlanta, Georgia, and divers other places to the grand jurors unknown, to Dade County, State of Florida, certain women and girls, to-wit: Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe, sometimes known as Frances Hollborn, and divers and sundry other women and girls whose **names** are to the grand jurors unknown."

The grand jurors, therefore, charged the petitioner with having conspired to effect the illegal transportation in interstate commerce of certain **specific** persons (some of whose **names** were known and some of whose **names** were not known to the jurors); and the grand jurors did not charge him with having entered into a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted.

The petitioner moved (r. 7-9) in the trial court for the entry of an order by which the Government should be directed and required to file and to furnish to him a bill of particulars in and by which the Government should specify, "with reasonable certainty and definiteness, the names of any women or girls other than Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker and Frances Jobe [the women or girls whose names were known to the grand jurors], to effect the illegal transportation

of whom the Government expects to prove the defendant conspired." The motion was granted (r. 13-15) and the Government in its bill of particulars (r. 15-22) added only the name of Rachel Louise Clark to the list of the names of women or girls set forth in the indictment.

The petitioner, who had the right under and by virtue of the provisions of Article VI of the Amendments to the Constitution of the United States, to be apprised of the nature and cause of the offense which the Government expected to prove he committed, was not informed that, under the indictment, the Government, on its failure to prove that he conspired to effect the illegal transportation in interstate commerce of Mary Agnes McCullar, Frances Pauline McCullar, Billie Johnson, Ann Bennett, Jessie Asher, Betty Martin Tinker, Frances Jobe and Rachel Louise Clark, or any of them, would adopt and rely on the theory that the evidence was sufficient to show a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted.

The Government admittedly failed to prove that the petitioner conspired to effect the illegal transportation in interstate commerce of any of the women or girls named in the indictment and in the bill of particulars because (as the United States Attorney was forced to admit during the oral argument of the cause in the appellate court) there was no evidence that the petitioner had any knowledge of, or information as to, any plan or purpose to effect the transportation of any of such women or girls.

The theory that it was not necessary to prove that the petitioner knew of the purpose to transport or the actual transportation "of any particular girl or woman" and that it was sufficient to show that he knew of, and was a party to, a **general**, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women or girls whenever they should be needed or wanted, is a theory which evidently was evolved by the appellate court. The theory was not advanced either in the brief filed in behalf of the Government or in the oral argument of the United States Attorney before the appellate court. Counsel for the petitioner were not accorded the opportunity to submit their views (in opposition to such theory) fully and adequately by brief or oral argument.

If the judgment of the appellate court shall not be reversed, the petitioner will have been convicted of an offense with the commission of which the grand jurors did not charge or intend to charge him, and of the nature and character of which the petitioner was never informed until the appellate court rendered its opinion on April 26, 1943; and by such judgment the petitioner will be deprived of the right guaranteed to him in and by the provisions of Article VI of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation against him."

In the case of Rabens v. United States (C. C. A. 4), 146 Fed. 978, it was held that where an accused was indicted for a conspiracy to rob a specific post office, he could not be convicted, when the evidence failed to show that he had conspired to rob the specific post office named in the indictment, of a general conspiracy to rob banks

and "everything that was robbable." The court observed that "the district attorney could undoubtedly have charged a general conspiracy to rob," but that "he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the post office at Latta."

The decision of the appellate court in the instant case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in the cited case.

We submit that the decision in the cited case is founded on the well established principle of law that a defendant in a criminal case may not be charged with one offense and convicted of another.

In the case of United States v. Wills (C. C. A. 3), 36 Fed. (2d) 855, the defendants were charged with a general comprehensive conspiracy, and the Government proved "sundry small conspiracies," but was unable to prove the alleged general conspiracy. The court held that the trial judge "properly directed an acquittal" on the ground that there was a variance between the allegations of the indictment and the proof. The court cited, with approval, the case of Rabens v. United States, supra.

III

IF AN INDICTMENT IS SO FRAMED THAT UNDER IT A DEFENDANT MAY BE CONVICTED OF EITHER OF TWO OFFENSES (THE OFFENSE OF HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE

COMMERCE OF **SPECIFIC** WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY; OR OF THE OFFENSE OF HAVING CONSPIRED WITH OTHERS TO EFFECT, AT SOME INDETERMINATE FUTURE TIME, THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS, WHENEVER THEY SHOULD BE NEEDED OR WANTED, FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS, WITHOUT HAVING IN CONTEMPLATION THE TRANSPORTATION OF ANY **SPECIFIC** WOMAN OR GIRL), OR MAY BE CONVICTED OF BOTH OF SUCH OFFENSES, SHOULD NOT THE INDICTMENT BE QUASHED, ON TIMELY AND APPROPRIATE MOTION, BECAUSE (A) IT IS DUPLICITOUS; (B) IT DOES NOT SUFFICIENTLY APPRISE THE DEFENDANT, IN CONFORMITY TO THE PROVISIONS OF ARTICLE VI OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION, OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM; AND (C) THE DEFENDANT, IF PROSECUTED UNDER SUCH INDICTMENT, WOULD BE DENIED DUE PROCESS OF LAW AND SUBJECTED TO THE DANGER OF BEING TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE IN VIOLATION OF THE PROVISIONS OF ARTICLE V OF THE AMENDMENTS TO THE FEDERAL CONSTITUTION?

It seems to us that the question itself suggests the

answer to it; and that no argument need be advanced or authorities cited in support of our contention that the question should be affirmatively answered.

IV

WHERE, IN A CRIMINAL CASE IN WHICH A DEFENDANT IS CHARGED WITH HAVING CONSPIRED WITH OTHERS TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE PROVISIONS OF THE WHITE SLAVE TRAFFIC ACT, THE EVIDENCE UTTERLY FAILS TO SHOW THAT THE DEFENDANT BECAME A PARTY TO SUCH CONSPIRACY, AND EVEN FAILS TO SHOW THAT HE HAD ANY KNOWLEDGE OF ANY PLAN OR PURPOSE TO EFFECT SUCH TRANSPORTATION, IS NOT THE SUPREME COURT OF THE UNITED STATES WARRANTED IN REVERSING A JUDGMENT OF CONVICTION, AND SHOULD IT NOT DO SO, WHEN IN TIMELY AND APPROPRIATE CERTIORARI PROCEEDINGS THE INSUFFICIENCY OF THE EVIDENCE IS CLEARLY AND INDISPUTABLY REVEALED BY THE RECORD?

In holding and deciding that the evidence was sufficient to warrant the jury's finding that the petitioner knew of, and was a party to, a general, comprehensive and continuing conspiracy to effect the illegal transportation in interstate commerce of women and girls whenever they should be needed or wanted, without having in contemplation the transportation of any specific woman or

girl, the appellate court utterly ignored or disregarded the evidence, which wholly fails to provide any basis or predicate for such holding or decision.

It would extend the brief to an undue length if we should review and analyze in the brief all of the evidence (r. 33-653). We earnestly invite and solicit a thorough and microscopic examination by the Court of the transcript of the evidence. Such examination will disclose that there is no evidentiary basis for the petitioner's conviction. Nothing which the petitioner did and nothing which he said throughout the entire period during which he was connected with the night club in question was done or said for the purpose of furthering any plan or conspiracy to effect the illegal transportation of women or girls in interstate commerce. The evidence fails to reveal that he had any knowledge of any such plan or conspiracy.

The arbitrary, unwarranted and utterly baseless statement by the appellate court in its opinion that the evidence was sufficient is surely not a bar to this Court's reversing the judgment of the appellate court when the insufficiency of the evidence is clearly and indisputably revealed by the record.

V

WHERE, IN A PROSECUTION FOR CONSPIRING TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE WHITE SLAVE TRAFFIC ACT, IT IS CLEARLY AND ADMITTEDLY SHOWN BY

THE INDICTMENT AND BY THE EVIDENCE THAT TWO GOVERNMENT WITNESSES, ON WHOSE TESTIMONY THE GOVERNMENT MAINLY RELIES AND WITHOUT WHICH THE GOVERNMENT COULD NOT EXPECT OR HOPE TO CONVICT THE ACCUSED, ARE CO-CONSPIRATORS AND ACCOMPLICES, IS NOT THE DEFENDANT ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE CORRECTLY INSTRUCTED THAT "SUCH TESTIMONY SHOULD BE RECEIVED WITH EXTREME CAUTION"; AND IS NOT THE REFUSAL OF THE TRIAL COURT TO GIVE SUCH CHARGE, OR ANY CHARGE OF SIMILAR IMPORT, PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE IS GRAVE AND SERIOUS DOUBT AS TO THE GUILT OF THE ACCUSED AND HIS TESTIMONY ON EVERY MATERIAL POINT IS IN DIRECT AND SHARP CONFLICT WITH THAT OF SUCH WITNESSES?

The stated fifth question has been affirmatively answered by the Court of Appeals of the District of Columbia in the case of Freed v. United States, 266 Fed. 1012, decided after this Court had decided the cases of Caminetti v. United States, 242 U. S. 470, 61 L. ed. 442, 37 S. C. 192, and Holmgren v. United States, 217 U. S. 509, 54 L. ed. 861, 30 S. C. 588 (which were cited, discussed and analyzed by the Court of Appeals in its opinion in the cited case).

The decision of the appellate court in the instant case, because of the court's sanctioning the trial court's refusal to give the instruction numbered 6 (quoted in the foregoing petition) of the instructions requested by the

petitioner, is in direct conflict with the decision
Court of Appeals of the District of Columbia in the
case.

We believe and contend that in the court's o
in the cited case the law is well and correctly state

VI

IN A PROSECUTION FOR CONSPIRING T
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The Court's general charge may be found at
654-676 of the record. An examination of the charg
disclose that the trial court nowhere instructed the

in plain, simple, direct and understandable language that if the petitioner had no knowledge of any plan or purpose to effect the illegal transportation in interstate commerce of women or girls he could not be guilty of conspiring to effect such transportation.

One cannot be guilty of criminally conspiring to do something unless he knows what it is which is to be done or attempted. The petitioner wanted the trial judge to tell the jury so in language which the average juror could readily understand. The refused instruction numbered 10 was designed to accomplish the petitioner's purpose; and we think that the instruction, or a similar charge, should have been given.

VII

WHERE, IN A PROSECUTION FOR CONSPIRACY TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS IN VIOLATION OF THE WHITE SLAVE TRAFFIC ACT, THE GOVERNMENT RELIES ON CIRCUMSTANTIAL EVIDENCE SOLELY (DESPITE THE FACT THAT TWO OF THE DEFENDANT'S ALLEGED CO-CONSPIRATORS AND ACCOMPLICES TESTIFY WILLINGLY AS GOVERNMENT WITNESSES, BUT ARE UNABLE TO GIVE ANY DIRECT OR POSITIVE TESTIMONY THAT THE ACCUSED KNEW OF, AND BECAME A PARTY TO, THE ALLEGED CONSPIRACY), IS NOT THE DEFENDANT ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE INSTRUCTED THAT "THE TRUE TEST BY WHICH TO DETERMINE THE VALUE OF CIRCUMSTANTIAL

EVIDENCE, IN RESPECT TO ITS SUFFICIENCY TO WARRANT A CONVICTION IN A CRIMINAL CASE, IS NOT WHETHER THE PROOF ESTABLISHES CIRCUMSTANCES WHICH ARE CONSISTENT OR WHICH COINCIDE WITH THE HYPOTHESIS OR THEORY OF THE GUILT OF THE ACCUSED, BUT WHETHER THE CIRCUMSTANCES, SATISFACTORILY ESTABLISHED, ARE OF A CONCLUSIVE CHARACTER AND POINT SO SURELY AND UNERRINGLY TO THE GUILT OF THE ACCUSED AS TO EXCLUDE EVERY REASONABLE HYPOTHESIS OR THEORY OF HIS INNOCENCE"; AND IS NOT THE REFUSAL OF THE TRIAL COURT TO GIVE SUCH CHARGE, OR ANY CHARGE IN WHICH THE STATED PRINCIPLE IS CLEARLY AND ADEQUATELY EXPRESSED, PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE IS GRAVE AND SERIOUS DOUBT AS TO THE GUILT OF THE ACCUSED?

The case, because of the character of the evidence adduced against the petitioner, demanded a clear, complete and adequate charge on circumstantial evidence. The trial court's general charge (r. 654-676) fell far short of being a satisfactory and elucidative exposition of the law of circumstantial evidence.

It was of vital importance to the petitioner that the jurors be advised and that they understand that "the true test by which to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent or which

coincide with the hypothesis or theory of the guilt of the accused, but whether the circumstances, satisfactorily established, are of a conclusive character and point so surely and unerringly to the guilt of the accused as to exclude every reasonable hypothesis or theory of his innocence." It was especially and peculiarly important that the jurors be so advised because of the fact that two of the petitioner's alleged co-conspirators and accomplices testified willingly for the Government, but were unable to give any direct or positive testimony that the petitioner had conspired with them, or with any of the alleged co-conspirators, to effect the interstate transportation of any women or girls.

The appellate court held that the refused instruction numbered 24 is a correct charge. If it is (and there can be no doubt that it is) it should have been given; and the trial court, in refusing to give it, failed to accord to the petitioner the protection and the safeguards to which he was entitled.

VIII

IN A PROSECUTION FOR CONSPIRING TO EFFECT THE ILLEGAL TRANSPORTATION IN INTERSTATE COMMERCE OF WOMEN AND GIRLS FOR THE PURPOSE OF EMPLOYING THEM IN SUCH SURROUNDINGS AS WOULD TEND TO INDUCE THEM TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY, ARE NOT THE MATURITY OR IMMATURITY AND THE EXPERIENCE

OR INEXPERIENCE OF THE WOMEN OR GIRLS (WHOSE TRANSPORTATION IT IS ALLEGED THE DEFENDANT CONSPIRED TO EFFECT) MATERIAL FACTS FOR THE JURY'S CONSIDERATION? AND IS NOT THE ACCUSED ENTITLED TO A CHARGE BY WHICH THE JURY SHALL BE INSTRUCTED THAT THE MATURITY OR IMMATURITY AND THE EXPERIENCE OR INEXPERIENCE OF SUCH WOMEN AND GIRLS ARE MATERIAL FACTS FOR THE JURY'S CONSIDERATION; AND IS NOT THE TRIAL COURT'S REFUSAL TO GIVE SUCH CHARGE PREJUDICIAL AND REVERSIBLE ERROR, PARTICULARLY WHERE THERE ARISES FROM THE EVIDENCE A GRAVE AND SERIOUS DOUBT AS TO WHETHER THE SURROUNDINGS IN QUESTION ARE SUCH AS WOULD TEND TO INDUCE THE WOMEN AND GIRLS IN QUESTION TO GIVE THEMSELVES UP TO A CONDITION OF DEBAUCHERY WHICH EVENTUALLY AND NATURALLY WOULD LEAD THEM TO A COURSE OF IMMORALITY SEXUALLY?

The stated eighth question has been affirmatively answered by the United States Circuit Court of Appeals for the Seventh Circuit in the case of United States v. Lewis, 110 Fed. (2d) 460.

The cited case was one in which the defendants were charged in the language of the White Slave Traffic Act with having unlawfully transported in interstate commerce girls "with the unlawful and felonious intent and purpose" . . . that the girls should "engage in an immoral practice, to-wit, prostitution and debuachery" (language

vastly different from that used in the indictment in the instant case). The proof in part was similar to that in the instant case. The girls involved in the cited case were employed by the defendants to take part in public exhibitions which the defendants furnished as a part of the entertainment features of a traveling carnival. The theme of the exhibition in which the girls took part was essentially sex, and its medium of expression was nudity accompanied by words and pantomine which emphasized sexual action. The court said (on the point presented by the stated eighth question):

> "Here, as in the Athanasaw case, the deciding question, apart from the fact of transportation, is whether the circumstances, surroundings and influences to which the employment subjected them tended to induce them to give themselves up 'to a condition of debauchery which eventually and naturally would lead to a course of immorality sexually.' Consequently, **the immaturity and inexperience of the girls were material facts for the consideration of the jury.** If, instead of immature and inexperienced girls the defendants had been charged with transporting mature women, who had had experience in public exhibitions of the type involved in this case, the jury necessarily would have taken that into consideration in deciding whether the employment with its surroundings and influences would have tended to induce them to give themselves up to a condition of debauchery 'which eventually and naturally would lead to a course of immorality sexually.'"

The appellate court in the instant case held that the instruction numbered 29 of the instructions requested by the petitioner, which was based on the quoted language of the court in the cited case, "was a wholly incorrect statement of the law."

By such holding the court placed itself in direct conflict with the United States Circuit Court of Appeals for the Seventh Circuit.

IX

WERE NOT THE BOUNDS OF PROPRIETY AND FAIRNESS WHICH SHOULD CHARACTERIZE THE CONDUCT OF GOVERNMENT PROSECUTING ATTORNEYS IN THE PROSECUTION OF A CRIMINAL CASE OVERSTEPPED IN THE INSTANT CASE, TO THE PREJUDICE OF THE PETITIONER, BY THE PRONOUNCED AND PERSISTENT MISCONDUCT OF THE PROSECUTING ATTORNEYS IN MISSTATING FACTS IN THEIR EXAMINATION OF WITNESSES; IN PUTTING INTO THE MOUTHS OF WITNESSES THINGS WHICH THEY HAD NOT SAID; IN SUGGESTING BY THEIR QUESTIONS THAT STATEMENTS HAD BEEN MADE BY WITNESSES WHICH WERE NOT IN FACT MADE; BY WITHHOLDING IMPORTANT AND MATERIAL DOCUMENTARY EVIDENCE IN THE POSSESSION OF THE GOVERNMENT FROM THE DEFENDANT; BY INSINUATING THAT THE ORIGINAL OF A LETTER, AN UNSIGNED CARBON COPY OF WHICH WAS INTRODUCED IN EVIDENCE, HAD BEEN SIGNED BY THE DEFENDANT WHEN THEY KNEW IT HAD BEEN SIGNED

BY ANOTHER PERSON; BY FALSELY REPRESENTING TO THE TRIAL COURT, IN THE JURY'S PRESENCE, THAT A MATERIAL GOVERNMENT WITNESS, WHO WAS UNDER SUBPOENA, WAS NOT AVAILABLE WHEN IN FACT HE WAS AND BY DELIBERATELY CONVEYING TO THE JURY THE IMPRESSION THAT THE TESTIMONY OF SUCH WITNESS WOULD BE FAVORABLE TO THE GOVERNMENT, BUT THAT THE GOVERNMENT WAS DEPRIVED OF SUCH TESTIMONY BECAUSE OF THE FAILURE OF THE WITNESS TO REMAIN IN ATTENDANCE; BY PURPOSELY ELICITING HALF-TRUTHS FROM WITNESSES AND COMPELLING THE ACCUSED TO ASSUME THE BURDEN OF ELICITING THE WHOLE TRUTH; BY MAKING NUMEROUS INSINUATIONS AND ASSERTIONS CALCULATED TO MISLEAD THE JURY; IN EXPRESSING IN THEIR CROSS-EXAMINATION OF THE ACCUSED THEIR PERSONAL AND ANTAGONISTIC VIEWS AS TO HIS CHARACTER AND CONDUCT; BY "BULLYING" AND ARGUING WITH THE ACCUSED DURING THEIR CROSS-EXAMINATION OF HIM; AND BY ENGAGING IN OTHER IMPROPER TACTICS AND "STRATEGY"? AND SHOULD NOT THE JUDGMENT OF CONVICTION BE REVERSED BECAUSE OF SUCH MISCONDUCT (ALTHOUGH NO ASSIGNMENT OF ERROR WAS PREDICATED THEREON), ESPECIALLY IN VIEW OF THE FACT THAT THE CASE WAS NOT STRONG AND DEPENDED ALMOST ENTIRELY ON THE TESTIMONY OF ALLEGED CO-CONSPIRATORS AND ACCOMPLICES?

It is impossible to narrate and review in detail in this

brief all of the instances of misconduct on the part of the prosecuting attorneys unless we should abandon all effort to achieve brevity. At pages 41, 59, 191, 201, 319, 320, 357, 368, 369, 409, 410, 456-458, 529, 533, 534, 600, 606, 611, 615, 618, 622, 623, 625, 627, 629, 631, 634-638, 640 and 641 some of the misconduct of the prosecuting attorneys is reflected.

In the cases of Viereck v. United States (decided March 1, 1943) and Berger v. United States, 295 U. S. 78, 79 L. ed. 1314, 55 S. C. 629, the Court condemned misconduct of prosecutors which was no more flagrant or reprehensible than that involved in the instant case.

CONCLUSION

If the words inscribed over the entrance to the magnificent edifice which houses the nation's highest tribunal—"EQUAL JUSTICE UNDER THE LAW"—are not a meaningless and hypocritical expression of a discarded ideal, this Court ought to seize the opportunity to remedy the abominable and intolerable injustice to which the petitioner has been subjected. Tried for "the sins of a lifetime" on an indictment which was regarded by the trial court and the prosecuting attorneys as an omnibus charge under which anything and everything could be proved, in an intensely prejudicial atmosphere accentuated by the misconduct of counsel for the Government, he is a victim of the dangerous philosophy that "the end justifies the means."

We sincerely and conscientiously plead that the law of the land be applied in the interest of the petitioner;

and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted by

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June 21, 1943.